

Dec. 14. 1752.

A N S W E R S

F O R

John Fullarton of Kinnaber, and Colonel
John Scot of Comistoun,

T O T H E

Petition of *Arthur Straiton of Kirkside.*

THE River of *Northesk* is the acknowledged March betwixt the Shires of *Kincardine* on the North, and of *Forfar* on the South; and whatever gradual or imperceptible Changes of late Years may have occurred in the Course of this River, before it enters the Sea, where it runs through a Tract of flat Ground, or dead Sands, it still continues to be the Boundary of these two Counties.

The Lands of *Kinnaber* are situated upon the South-side of this River, and run down to the Sea, and Southwards alongst the Sea-shore for a considerable Way, where no other Heritor interferes.

The Lands of *Wardropperton*, which belong to the other Respondent Colonel *Scot*, are situated upon the North-side of said River, and in like Manner run down to the Sea-shore, and Northward, alongst that Shore, for a considerable Space;

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so that as this River is the Boundary betwixt the two Shires, it is also the March betwixt the Respondents Property Lands; and as Colonel *Scot* has no Lands on the South of said River, so neither has *Kinnaber* on the North-side thereof.

Kirkside's Property Lands ly to the Northward of *Wardropperton*, at a considerable Distance from this River, according to its ancient Channel and Course; and tho' *Kirkside*, in describing the Boundary of that Sea-fishing, to which he is intitled by his Charters from the Crown, by these Words, *infra limites dictarum terrarum*, figures an imaginary Line, drawn from the House of *Kirkside*, through the *Windpath*, and from thence downward in a straight Line to the Sea, purposing thereby to comprehend within the Limits of his Sea-fishing, all that Compass of Sands which the Sea covers at High Water, to the Northward of that imaginary Line, and consequently as comprehending so much of the River of *Northesk*, as now runs through that Part of the Sands, be north said Line, before it enters into the Sea; the Respondents are far from admitting this imaginary Line to be the proper March or Boundary, or that any Part of the Sands through which the River of *Northesk* now runs, before it is lost in the Sea, is within the Limits of *Kirkside's* Sea-fishing.

Nor is it possible it should be so, when your Lordships are informed, that Part of Colonel *Scot's* Lands of *Wardropperton* are interjected betwixt the *Windpath* and the Sea, and run further North upon the Coast than the *Windpath*. But as it is not to the present Purpose to settle the precise Limits of this Sea-fishing, in which Parties appear to differ widely, the Interlocutors already pronounced in this Cause are hypothetical, referring it to the Lord Ordinary to hear Parties upon the Limits of their several Lands; so that it does not occur, for what good Purpose the Pursuer, in this State of the Process, should trouble your Lordships upon every Occasion with a Summary of that Proof taken *ex parte* before an incompetent Court, for ascertaining the Limits of his Sea-fishing.



ing. When the Point of Law shall be finally settled, then, and no sooner, will be the proper Time for Parties to dispute by what Line *Kirkside's* Sea-fishing is to be limited; and therefore, without entering further into that Dispute, which is not *hujus loci*, it is sufficient for the Respondents to aver in the general, that no Part of the Sands through which this River now directs its Course, before it is totally lost in the Sea, is within that Line described by *Kirkside's* Charters, by these Words, *Infra limites dictarum terrarum*.

It is an agreed Fact, that this River, according to its ancient and original Channel, until, within these very few Years, run into the Sea, through a Tract of flat Sands, to the Southward of where it now runs, directly betwixt the Lands of *Kinnaber* and *Wardropporton*; and as the Respondents Property Lands extended alongst the Sea-shore for a considerable Space, both to the South and the North, they had a natural Right to the Favour of the Crown, in obtaining Grants of the Salmon-fishings, not only in the River itself, down to the lowest Ebb, but also to the Sea-fishing *ex adverso terrarum suarum*.

And as from the Beginning of this Cause it has been averred upon their Part, and yielded by the Pursuer, that they, their Predecessors and Authors, have immemorially possessed the Salmon-fishing upon this River, exclusive of all others, from that Point called the *Nab* of *Kinnaber*, as described in the Plan, down to the lowest Ebb, so it is certain Fact, which, if denied, can easily be proved, that by reason of the Shallowness of this River, where it runs upon the Flat, and through the Sands, it cannot be fished to any Purpose, or with any Advantage, but by coming up with the Tide as it flows, and following it down as it ebbs; so that to exclude them from continuing to fish in the same Manner, within that Part of the River where it enters the Sands, wherever that is, down to the lowest Ebb, would import a total Forfeiture of this Fish-

Fishing, which is so valuable a Part of their Estates, for which they pay considerable Feu and Teind Duties, and which are so high valued in the Supply Books of these respective Counties.

The Title-deeds under which the Respondents and their respective Predecessors, have severally enjoyed this Salmon-fishing, without Impeachment, both upon the River of *Northesk*, down to the lowest Ebb, and upon the Sea opposite to their respective Properties, tho' the Sea-fishing, it must be confessed, has of later Years, been greatly neglected, because of the more valuable Fishing upon the River, to which they totally applied themselves, are these following :

And in the *first* Place, there is produced for Mr. *Fullarton* of *Kinnaber*, a Charter under the Great Seal in the Year 1672, of the Lands of *Kinnaber*, *Cum piscationibus salmonum aliorumque piscium in aqua de Northesk, tam intra fluxum maris quam extra eundem, in quavis parte dictæ aquæ, ex adverso dict. terrarum & baroniæ de Kinnaber.* 2dly, The same Charter contains a Grant of a Sea-fishing, in the following Words: *Et etiam piscationes salmonum aliorumque piscium super littore maris, inter dictam aquam de Northesk & Southesk.* 3dly, As *Kinnaber* had purchased from the Proprietor of *Wardropperton*, a Part of his Salmon-fishing upon the said River, this Charter of new grants that Fishing in the following Words: *Et totas & integras piscationes, & salmonum piscationes, cum pertinent. dict. Johannis Fullarton de Kinnaber, in aqua de Northesk, ad dimidietatem terrarum de Wardropperton, proprius pertinent. jacen. in vicecomitatu de Kincairden, extenden. ad piscationem trium integrarum cymbarum liecobles, & trium retium.*

And, as besides these, *Kinnaber* had also Right to certain other Fishings upon this River, derived from the Town of *Montrose*, the Charter contains a general Confirmation of all *Kinnaber's* other Fishings upon said River.

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From the Words of this Charter, *Kinnaber* being not only entitled to the Salmon-fishing upon this River, *tam intra quam extra fluxum maris*, but also to the Sea-fishing *super littore maris*, betwixt the Rivers of *Northesk* and *Southesk*; it is impossible to suppose, that it could be the Intention of the Crown so to limit this Grant of the River-fishing, as to exclude so much of the River as runs through the Sands betwixt the highest and lowest Flood-mark, or to reserve that Part of the River-fishing to the Crown. That it was not comprehended under the Grant of the Sea-fishing, is obvious, because the Sea-fishing is limited and described to be *super littore maris, inter aquam de Northesk & Southesk*; so that no Part of these Rivers, even after they enter the Sands, could be included under that Grant of the Sea-fishing; and as these Rivers are by this Charter made the Boundaries of the Sea-fishing *super littore maris*, it must have been understood, that these Rivers were not absorbed how soon they entered the Sands, because of their being covered with the Sea at High-flood; they are fresh Water when the Sea is not down to the lowest Ebb; that fresh Water restagnates by the Return of the Tide which flows up the Channel, but at all other Periods it is fresh Water, and retains the Form of a River, having a hollow Channel running through the Sands, down to the lowest Ebb; and therefore the River of *Northesk*, upon which the River-fishing was by the preceeding Clause of that Charter constituted *tam intra quam extra fluxum maris*, was properly made the Northern Boundary of *Kinnaber's* Sea-fishing.

And if these Words of *Kinnaber's* Charter, *tam intra quam extra fluxum maris*, could have admitted of any Doubty as to its entitling *Kinnaber* to fish down to the lowest Ebb, or to follow the Tide in its flowing and ebbing; the immemorial and uninterrupted Possession that has confessedly been had, would be more than sufficient to establish this Right by

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positive Prescription, or, at least, to explain what was really understood and intended to be the Import of this Grant.

And therefore it is scarce necessary to add, which the Respondents undertake to prove, if your Lordships shall be pleased to indulge them with a Diligence for that Purpose, that this is not peculiar to the River of *Northesk*, but that the same Thing obtains in all the other Rivers upon that East-coast, particularly in the Rivers of *Southesk*, *Dee* and *Don*, where the River-fishing, without the Addition of these Words, *tam intra quam extra fluxum maris*, has by immemorial Usage been so explained to entitle the Heritor of these Fishings to fish down to the lowest Ebb; tho' in these Instances also, there are Grants of the Sea-fishing, in Favours of third Parties, who would be entitled to maintain the same Plea that the Pursuer now does, *viz.* to limit and circumscribe the River-fishings to that Point, where they first enter the Sand at highest Flood-mark. And if this Proof as to the other Rivers upon that Coast shall be thought in any Degree material; the Pursuer has no Occasion to be solicitous as to the Mean of Proof, or how third Parties can be compelled to produce their Title-deeds: The Respondents aver the Fact to be as above stated, and are willing to take upon themselves the *onus probandi*.

And if further Evidence were requisite to explain what was understood or intended by this Grant of the River-fishing, *tam intra quam extra fluxum maris*, *Kinnaber* might appeal to the Tack of Teinds herewith produced, granted by the Barons of Exchequer in the Year 1730, whereby they let to him, ' all and sundry, the half Teind of the hail Sal-
' mon-fishing and White fishing, in and upon the Water of
' *Northesk*, as well of the Fishes taken in the Cruives, as
' these otherwise taken by Cobles and Nets, *in the said Wa-*
' *ter, or at the Mouth thereof, both in salt and fresh*
' *Water.* Which Fishing was purchased by the deceased
' *John Scott of Commiston, from Robert Graham of Mor-*
' *phie,*

• *phie.* And sicklike, all and hail the whole Teinds of the
 • Salmon-fishing, and other Fishings, *within and at the*
 • *Mouth of the said Water of Northesk*, which pertained
 • to the said *John Fullarton* of *Kinnaber*, or his Predecessors
 • heritably.'

The Subject of this Tack was the Teinds of *Kinnaber's* own Fishings upon the River of *Northesk*, and these are described as not only comprehending what was caught in the fresh Water, or in the River itself, according to the most limited Descriptions, but also of the Fish taken in the salt Water, and in the Mouth of the River, as the same had been formerly possessed by *Kinnaber* and his Predecessors; and as the only valuable Part of this Fishing is by following up the Tide from the lowest Mark through these Sands, and downwards as the Tide ebbs, it would have been hard beyond Measure, had the River continued in its former Channel, to have excluded *Kinnaber* from continuing to possess this Fishing as his Predecessors had immemorially done, whilst at the same time subject to publick Burdens at so high a Valuation, and to a Feu and Teind-duty to the Crown.

Colonel *Scot* the other Respondent produces a Charter under the Great Seal, in favours of his Father in the Year 1708, of a third Part of the Salmon-fishing in the Water of *Northesk*, holding Taxt-ward of the Crown, which formerly pertained to the Earl of *Montrose*, and of another Fishing called *St. Thomas's Net*, with the Half of another Salmon-fishing, *juxta & infra bondas prædict. terrarum de Wardropporton*; and as Sea-fishings are generally esteemed to be Parts and Pertinents of the adjacent Lands, so as to be carried by a Grant of the Lands themselves, so far at least as to be a proper Title of Prescription; so it is certain Fact that the Proprietor of *Wardropporton*, under the above-mentioned Charter, granting a Salmon-fishing in general, *juxta & infra bondas prædict. terrarum de Wardropporton*, did hold and enjoy a Salmon-fishing not only upon the River itself jointly with *Kinnaber*,

naber, but also a Sea Fishing *super littore*, adjacent to the Lands of *Wardropperton*.

And as both *Kinnaber* and Colonel *Scot's* Predecessors had Right to other Fishings upon this River, from which sundry Disputes did arise, these were regulated by particular Agreements, whereby they, as having the only Right to this Fishing, either upon the River itself, or *super littore* upon both Sides of this River, did agree to a promiscuous and joint Fishing by certain Proportions.

Upon this Footing Matters continued, while the River maintained its ancient Channel, as the Respondents had no Disputes amongst themselves, so neither was there Place for any with *Kirkside*: But as of later Years this River, by throwing up Banks of Chingle where it entred into the Sands, obstructed its former Passage down to the Sea, and gradually cut out a new Channel Northward amongst the Head of these Sands, whereby so great a Benefit has accrued to *Kirkside*, Occasion has from thence been taken to challenge the Respondents Right to the Fishing upon that Part of the River where it runs through the Sands, within the supposed Line of *Kirkside's* Sea-fishing, as absorbed in that Sea-fishing, from the Moment the River enters into these Sands.

And as this is the Scope of the present Action of Declarator at *Kirkside's* Instance, the Respondents rested their Defence upon the *species facti*, as above stated, *viz.* that by virtue of the above-mentioned Charters and Grants they had the sole and exclusive Right to the Salmon-fishing upon this River down to the lowest Ebb; that this Right was established by the positive Prescription, and the Import of the Grant explained by immemorial Usage and Possession: And therefore that however the River may of later Years have changed its Course, by running farther North amongst these Sands, they were intitled to follow the River, and to continue their former Possession, by fishing down to the lowest Ebb, supposing in the Event it should appear to be true that some Part of the Sands

Sands through which the River runs, did fall within the Limits of *Kirkside's* Sea-fishing; that the River was not thereby absorbed in the Sea, however covered by the Sea as the Tide flowed up. It was fresh Water at all other Times, and had formed to itself a new Channel, it became *ejusdem juris* with the River itself, and consequently the River Fishing must remain as formerly.

The Petition now to be answered reclaims against your Lordships Interlocutor of the 18th *November* last, ' finding that the Defenders, notwithstanding of the Change of the Channel of the River, have Right to fish down to the lowest Flood-mark, but finding that the Pursuer, in Right of his Infeftment in the Sea-fishing, has a joint Right of fishing with the Defenders above the lowest Flood-mark, when the River is covered by the Sea, opposite to his Lands of *Kirkside*, so long as the River occupies a Channel opposite to the said Lands: and remitting to the Lord Ordinary to proceed accordingly; and to hear Parties upon the Limits of their several Lands.'

This Judgment is singularly unlucky, as it is equally offensive to both Parties; and though the Respondents were advised not to give your Lordships the Trouble of a reclaiming Petition upon their Part against so much of said Interlocutor as entitles *Kirkside* to a joint Fishing with them above the lowest Flood-mark, when the River is covered by the Sea opposite to his Lands, so long as the River occupies a Channel opposite to said Lands, it will not be understood that they intend to acquiesce therein, or rest satisfied therewith, when they are now to maintain the other Branch of that Interlocutor complained of by *Kirkside*.

It is extreamly remarkable upon the Face of this reclaiming Petition, that the Pursuer, diffident as it would seem of his own Title, under the Grant of a Sea-fishing *infra limites dictarum terrarum de Kirkside*, becomes a Champion for the Fishing of *Wardropperton*; and by setting up this particular

cular Fishing, in Opposition to the Respondent's other Fishings upon this River, attempts to destroy both. But as the whole of this Argument proceeds upon Facts manifestly erroneous, so when these shall be set to Rights, the Inferences in Point of Law must vanish.

And in the *first* Place, it is taken for granted that the Heritor of *Wardropperton* *qua* such had no Right to a Sea-fishing, but allenarly to a Fishing in the River within the Bounds of the Lands of *Wardropperton*; so that while the River run in its ancient Channel, there could be no interfering betwixt the Petitioner's Sea-fishing and *Wardropperton's* River fishing.

But this is plainly begging the Question; for as your Lordships have heard from the Title Deeds, as above stated, that General *Scot*, by Virtue of his Charter under the Great Seal in the Year 1708, agreeably to the Charters of his Predecessors, stood infest in sundry Fishings, and more paticularly in the half of a Salmon-fishing thus described, *juxta & infra bondas prædict. terrarum de Wardropperton*, without being limited either to the River or to the Sea; and as these Lands of *Wardropperton* do not only ly along the North Side of said River of *Northesk* down to the Sea, but extend northward along the Sea Shore 'till they meet the Lands of *Kirk-side*; so it is certain Fact, and which if denied can be proved, that the Heritor of *Wardropperton* did possess a Sea Fishing upon that Part of the Shore *ex adverso terrarum de Wardropperton*; and there are Contracts still extant of ancient Date, betwixt the then Proprietors of *Kinnaber* and *Wardropperton*, regulating their Fishings both upon the River down to the lowest Flood and their Sea Fishings, though it does not occur to the Respondents what Title the Pursuer has to interfere or stir up Disputes betwixt them. If either of them have Right to the Fishing of this River down to the lowest Flood Mark, and which will easily be presumed when there is none other can interfere, and which has immemorially been possessed,

ed, that must be sufficient in a Question with the Pursuer, who does not pretend the least Right to a Fishing upon this River.

And these Words in the Description of this particular Fishing as granted to the Heritor of *Wardropperton*, *juxta & infra bondas terrarum de Wardropperton*, can with no Reason be construed either to exclude a Fishing in the Sea upon that Part of the Sands opposite to the Lands of *Wardropperton*, or to limit the same to a River Fishing above the highest Flood Mark: No such Limitation is necessarily implied in the Words, and if these were doubtful, Usage and Possession would have explained the same. And the Pursuer ought to remember, that his own Right to the Sea Fishing is described in the identical same Words, *infra limites terrarum de Kirkside*: And if that intitles the Pursuer to fish upon the Sands opposite to his Property, it will be difficult to assign a good Reason why the Grant of a Salmon-fishing in general to *Wardropperton juxta & infra prædict. terr.* should not intitle him to a Fishing in the Sea opposite to these Lands, Sea Fishings being generally granted as Pertinent of the Lands upon the adjacent Coast, not as *jura separata*, but as Part and Pertinent of the Lands themselves, and therefore properly comprehended under such a general Description.

2dly, It is taken for granted, that the only Fishing under which the Respondents are intitled to maintain this Competition, is the Fishing that belonged to the Lands of *Wardropperton*, which the Pursuer endeavours so to explain, as not only to exclude *Kinnaber's* Fishing upon this River, *tam intra quàm extra fluxum maris*, down to the lowest Flood Mark, as ascertained by the above Interlocutor, but also to limit this particular Fishing belonging to *Wardropperton* to a Fishing upon the River *ex adverso* of these Lands.

But as the Respondents have already shown, that General *Scot's* Fishing *quà* Proprietor of the Lands of *Wardropperton* does admit of no such Limitation as is here supposed, they

they can as little conceive how that Fishing should destroy or limit *Kinnaber's* Fishing in Virtue of his Grants. There is surely no Inconsistency that there should be different Fishings by different Grants, in favour of different Heritors, having their Property Lands upon the opposite Sides of the same River. And the Fallacy of this Part of the Petitioner's Argument consists in this, that he supposes the River, as it now points its Course northward 'till it enters the Sands within the imaginary Line of *Kirkside's* Sea Fishing, to run through the Lands of *Wardropperton*, so that Colonel *Scot*, as Proprietor of the Lands on both Sides of the River should only be intitled to the River Fishing within the Limits of these Lands of *Wardropperton*. But as your Lordships have heard that *Kinnaber's* Lands up the South Side of this River run down to the Sea Shore, and as the River according to its new Course does not enter the Lands of *Wardropperton*, but runs along the Head of the Sands betwixt the Lands of *Wardropperton* and the Sea, that River continues as formerly to be the Southern March of the Lands of *Wardropperton*; and as it is still the Boundary of the two Counties, so also it is the March betwixt the Lands of *Kinnaber* and the Lands of *Wardropperton*; tho' even upon the contrary Supposition it would not vary the Case, as *Kinnaber* is admitted to have Right to a Part of that Fishing which formerly belonged to these Lands of *Wardropperton*.

Upon these Suppositions the Petitioner proceeds to remark, that the Grant to *Kinnaber* of a Fishing upon this River *tam intra quàm extra fluxum maris*, can give no Right to a Fishing upon that Part of the River, which according to its present Course, runs through the Lands of *Wardropperton*; for that the Charter 1672, which grants this Fishing to *Kinnaber*, is equal to a bounding Charter by these Words of Limitation, *ex quavis parte dictæ aquæ ex adverso dict. terrarum & baroniæ de Kinnaber*; and therefore that under this Grant *Kinnaber* could not have acquired a Fishing upon

upon this River outwith the Bounds of his Property Lands, even by immemorial Possession, and consequently that these Words in the Grant *tam intra quàm extra fluxum maris*, must be so construed as only to denote a Right to fish within the Salt Water where it flows up the River opposite to *Kinnaber's* Lands, or even above where the Tide flows, so as still to be confined within the Limits of *Kinnaber's* Property Lands.

The Respondents have already said that this Construction would be equal to a Forfeiture of this valuable Fishing, which *Kinnaber* and his Predecessors have immemorially enjoyed, independent of the Sea-fishing, from the *Nab* of *Kinnaber*, down to the lowest Ebb ; that the only Method known or practised, whereby this Fishing can be exercised to any Purpose, by reason of the Shallowness of the Water, is by following up and down the Tide from the highest to the lowest Flood-mark. That Place called the *Nab*, as described in the Plan, is the highest Point to which the Tide flows, above which there is no fishing, either with Nets or Cobles. The whole Fishing lies from that Point downwards to the Low Water-mark ; and therefore, where the Charter grants this Fishing *tam extra quam intra fluxum maris*, the Word *intra* properly denotes the flowing up of the Tide within the Land ; and the Word *extra*, that Part of the Fishing without the Land, down to the lowest Ebb. It could not be the Intention of the Grant to reserve this Part of the River-fishing to the Crown. It is plainly not comprehended under the Grant of the Sea-fishing, of which this River is made the Boundary. Grants of this Nature, where the Right of third Parties does not appear, fall to be most liberally construed ; and if there were any Doubt in the Expression, the immemorial Usage and Possession would explain the same.

It is therefore straining beyond Measure to say, that these Words *ex adverso dict. terrarum & baroniae*, are equal to a bounding Charter.

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They are descriptive, but not taxative, according to the State and Condition of the River at the Time ; and as there was no inferior Heritor, who had either Lands or Fishing interjected betwixt *Kinnaber* and the Sea, this Grant of the River-fishing *tam extra quam intra fluxum maris*, intituled *Kinnaber* to fish down to the lowest Flood, and immemorial Usage has so explained the Grant.

And as a Consequence of this, *Kinnaber* does insist, that the gradual Alteration of the Course of this River, running Northward through the Sands, could not impair his Right to follow the River, and to fish as formerly, down to the lowest Ebb. This would plainly have been the Case, if no other Fishing had interfered : And therefore the Question still returns to this, Whether the supposed casual Intercourse betwixt the River-fishing and *Kirkside's* Sea-fishing, does absorb the River-fishing ? If the Respondents were originally intituled to this River-fishing, down to the lowest Flood, and if the River was not understood, *quoad* the Effect of this Fishing, to be absorbed in the Sea, from its first Entry into the Sands, because of its being covered with the Sea-water upon the flowing of the Tide, it cannot now be absorbed in the Sea, by having shifted its Course some Points further North ; there would not have been Place for a Question of this Kind, if it had not interfered with *Kirkside's* Sea-fishing ; and therefore the Question, as applicable to the present State of Affairs, is not, whether the River is absorbed in the Sea, where it enters the Sands within the highest Flood-mark ; but whether the Respondents Fishing, as constituted upon this River, *tam intra quam extra fluxum maris*, and which, in the Argument, it must be supposed intituled the Respondents to fish down to the lowest Flood-mark, is either annihilated by the River's having changed its Course, or absorbed in *Kirkside's* Sea-fishing ? And as this Point was fully under your Lordships Consideration when the aforesaid Interlocutor was pronounced ; and that the Point principally laboured in this reclaiming Petition is to

to set up the *Wardropporton* Fishing in Opposition to the Fishing of *Kinnaber*, thereby to destroy both, whilst at the same Time the immemorial Possession which the Respondents and their Predecessors have enjoyed of this Fishing. in the Form and Manner now contended for, is not denied ; it is submitted to your Lordships, whether any sufficient Cause is assigned for altering this Interlocutor, so far as complained of by *Kirkside*, who having profited so much by the Approach of this River to his Sea-fishing, grasps at enhancing all that is valuable of the River fishing.

In respect whereof, &c.

ALEX. LOCKHART.

